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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-564

WELDON WATKINS and
CHRISTINE WATKINS,

Petitioners,

-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

PATRICK HENRY
District Attorney
Suffolk County
Attorney for Respondent
Criminal Courts Building
Center Drive South
Riverhead, New York 11091
(516) 727-1440

VINCENT A. MALITO
Chief, Appeals Bureau
FREDERICK EISENBUD
Assistant District Attorney
Of Counsel

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OPINIONS BELOW

The opinion of the Supreme Court, Suffolk County is reported at 89 Misc. 2d 870, 393 N.Y.S.2d 283. The opinion of the Appellate Division, Second Department is reported at 406 N.Y.S. 2d 343, and is not

yet officially reported. The order of the New York Court of Appeals denying leave to appeal to that court is reported at 45 N.Y. 2d 785.

JURISDICTION

The judgment of the New York Court of Appeals was entered on July 6, 1978, and a motion to reconsider was denied on July 28, 1978. The petition for a writ of certiorari was filed on September 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether, by not raising the issue on appeal, petitioners have waived any claim concerning the denial by the Trial Court of their motion for a hearing to determine the veracity of certain statements underlying an application for electronic surveillance, and, if the issue is not waived, whether their allegations were sufficient to warrant a hearing.

2. Whether the conversations between petitioners should have been suppressed on the ground they constituted privileged interspousal communications.

3. Whether it was necessary to name petitioners in the application for electronic surveillance and, if it was, whether the failure to name them requires that they be given a new trial.

STATEMENT

Following a jury trial in the Supreme Court, Suffolk County, New York petitioners were each convicted on one count of Promoting Gambling in the First Degree, a class E felony in violation of New York Penal Law § 225.10. Petitioner Christine Watkins was also convicted on one count of Possession of Gambling Records in the First Degree, a class E felony, in violation of New York Penal Law § 225.20.[1]

[1] Co-defendants Willie Clark and Frederick Hill pleaded guilty to various counts before trial.

Petitioner Weldon Watkins was sentenced to a definite term of imprisionment of one year. Petitioner Christine Watkins was sentenced to probation for a period of five years on each count, the sentences to run concurrently. The Appellate Division, Second Department affirmed (Pet. App. 68-69)[2], and the New York Court of Appeals denied petitioners' application for leave to appeal (Pet. App. 70). Petitioner Weldon Watkins is presently incarcerated.

The People's evidence consisted primarily of a stipulation stating that Willie Clark had conducted a policy operation from his home between October 4, 1976, and October 8, 1976, and that Willie Clark's telephone had been used by him in furtherance of the policy operation during that period; tape recordings of policy-related

[2]Petitioners included only the order and not the opinion of the Appellate Division in their Appendix. For the convenience of the Court, we have appended a copy of the Appellate Division's opinion to our brief, infra.

conversations between petitioners recorded over Willie Clark's telephone between October 4, 1976, and October 8, 1976 pursuant to court-authorized electronic surveillance; and policy slips and related records seized from Willie Clark's house on October 8, 1976 pursuant to a search warrant which established that more than three thousand policy wagers totalling more than $900.00 had been received by the operation on that day. The evidence established that Weldon Watkins was the "boss" of the policy operation, and that Christine Watkins was a controller who would relate business information to Weldon, and would deliver instructions from Weldon to other members of the operation.

ARGUMENT

1. Petitioners contend (Pet. 6-8) that they were denied Due Process because they were not granted a hearing on their claim that the application for authorization

to wiretap contained statements that were not true. Petitioners did not raise this claim in their brief to the Appellate Division, but argued it for the first time in their application to the Court of Appeals for leave to appeal. Accordingly, petitioners have waived their right to present this claim to this Court. See Radio Station WOW v. Johnson, 326 U.S. 120; cf. Lawn v. United States, 355 U.S. 339, 362 n. 16.

This claim was raised by co-defendant Willie Clark on appeal, however. The Appellate Division, after consideration of the briefs and oral argument, affirmed the conviction without opinion, and the Court of Appeals denied his application for leave to appeal. Clark then petitioned the United States District Court for the Eastern District of New York (Bramwell, J.) for a writ of habeas corpus, citing as one ground the failure of the trial court to grant a hearing to consider his claim of falsehood in the

application for the wiretap. On April 4, 1978, following the submission of memoranda and oral argument, the Court denied the petition on the ground that, under Stone v. Powell, 428 U.S. 465, and its progeny, the ruling of the state courts on essentially a Fourth Amendment issue could not be reviewed by the Federal Courts. This ruling was appealed to the United States Court of Appeals for the Second Circuit which affirmed in an oral opinion following argument (Clark v. Finnerty, No. 78-2070, decided August 30, 1978). It did not reach the Stone issue, however, because it agreed with the People's argument that the allegation of falsehood was insufficient to justify the holding of a hearing. The Court of Appeals considered the significance of Franks v. Delaware, ____U.S.____ (No. 77-5176, decided June 26, 1978), on which petitioners--represented by the same counsel as Clark--rely, and held that that case only required that states

permit a hearing to be held if a sufficiently supported allegation of perjury is made. Since it found the allegation in this case insufficient,[3] and New York has a well-established procedure that permits a hearing upon a proper allegation, see People v. Alfinito, 16 N.Y. 2d 181; New York Criminal Procedure Law § 710.60, the Court affirmed the denial of the petition for a writ of habeas corpus. This reasoning is fully applicable here, and, accordingly, no constitutional issue is raised by either of petitioners' first two points.

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[3]In his application for electronic surveillance authorization, Detective Jay Cseh stated that on September 11, 1976, "at approximately 6:00 P.M.," he overheard and recorded with the permission of a confidential informant a telephone conversation between Willie Clark and the informant over the subject telephone, and that he overheard "code numbers being discussed, track and handles being discussed, and 'hits' for that day's policy transactions." As part of a pre-trial motion to suppress the fruits of the surveillance, Willie Clark filed an affidavit charging that this statement was "false" since "On September 11, 1976 at about 6:00 P.M. I did not on telephone number 842-2184

2. Petitioners contend (Pet. 8-10) that the conversations between them that were intercepted pursuant to the wiretap authorization should have been suppressed as privileged communications between spouses. The Appellate Division agreed with the Trial Court, however, that "'the privilege does not extend to communications between spouses in which they are jointly advancing a criminal conspiracy or aiding each other in the commission of an on-going crime.' (People v. Watkins, 89 Misc. 2d 870, 874, 393 N.Y.S. 2d 283, 289; see, also, United States v. Kahn, 471 F. 2d 191, revd on other grounds 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 255)" (Appendix, infra). Since it is well established that the marital privilege is not

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[3](continued) discuss code numbers for collectors and/or runners, shortages, track and handles and hits for that day or any policy transactions at that time."

The People argued before the District Court and the Court of Appeals that this allegation was insufficient to warrant a hearing under the test laid down in Franks v.

constitutionally mandated, but may be fashioned by the courts and legislatures in light of common sense and reason, see Lutwak v. United States, 344 U.S. 604, 613-614; Matter of September, 1975 Special Grand Jury, 435 F. Supp. 538, 545 (N.D. Ind.), petitioners may not seek review by this Court of the scope of New York's privilege. See 28 U.S.C. § 1257 (3).

Petitioners suggest in their "Questions Presented"--but do not discuss in their argument--that, once the intercepting officers realized they were listening to a conversation between a husband and wife, they should have terminated their intercept, and advised the issuing court of this fact so that the

[3](continued) Delaware, supra, since: (1) there was no allegation of perjury; (2) Clark's statement was a classical negative pregnant since he did not deny participating in the conversation but only that it took place at 6:00 P.M.; (3) Clark did not deny that someone, even if it was not he, participated in the conversation with the informant over his telephone; and (4) the affidavit, even without reference to the allegedly false portion, contained sufficient facts upon which a finding

Court could determine whether the conversation was privileged. This claim was raised for the first time at oral argument before the Appellate Division, and was not directly addressed by that court.

There is no statutory requirement that such a procedure be followed, and it certainly is not one that the Constitution requires. The marital privilege, as the Appellate Division correctly observed, is a testimonial privilege that bars one spouse from testifying against the other at trial (Appendix, supra). Even if a tape recording of a conversation between spouses would come within this privilege, petitioners were able to move for suppression prior to trial. This procedure sufficed to protect any trial rights they might have had.

[3](continued) of probable cause could be based. These arguments formed the basis for the oral opinion of the Second Circuit in Clark.

3. Finally, petitioners contend (Pet. 10-18) that there was an intentional failure to name them in the wiretap application, and that the proper remedy is suppression. Their reliance on United States v. Donovan, 429 U.S. 413, is misplaced. The Court there noted in dictum that, had the failure to name the petitioner in the wiretap application been intentional and "for the purpose of keeping relevant information from the District Court that might have prompted the Court to conclude that probable cause was lacking" the case before them might have been different. Id. at 436, n. 23. Petitioners make no attempt here to explain how the failure to name them, even if intentional, could have enhanced the probability that the authorization would issue.

In any event, the Appellate Division correctly found (Appendix, infra):

> The police obviously recognized the possibility that conversations involving at least one of the defendants would be intercepted.
>
> However, there is no proof that the authorities, at the time they applied for the warrant, (1) knew or suspected that they would intercept conversations between the defendants or (2) withheld the names of the defendants from the Court so that it could not prevent them from intercepting arguably privileged exchanges. There is no reason to believe that the inclusion of the names of the defendants would have caused the Court to reject the application for the warrant.

The only possible way the investigating officers could have benefitted from withholding petitioners' names if they had probable cause to believe they would be overheard is that the issuing court might otherwise order them not to intercept conversations between petitioners. Since the

marital privilege does not apply in New York to conversations between spouses about an on-going crime in which they are both involved, there was no possibility that the issuing court would have denied the application or limited its scope if it knew of petitioners' possible involvement. The inclusion of petitioners in the application could only have enhanced the existence of probable cause. Accordingly, petitioners have failed to meet their burden of showing that the failure to name them -- if it was intentional[4] -- was for an improper purpose, and the remedy of suppression is unavailable to them. See United States v. Scafidi, 564 F.2d 633, 642 (2d Cir.); United States v. Diadone, 558 F.2d 775, 781 (5th Cir.), cert.denied, ___U.S.___, 98 S.Ct. 1239; United States v. Abrahamson, 553 F.2d 1164, 1172 (8th Cir.), cert.denied, 433 U.S. 911

[4]Even if the failure to name petitioners were intentional, the fruits of the electronic surveillance should not be suppressed if the warrant still would have issued had they been named. Cf. Franks v. Delaware, No. 77-5176 (Decided June 26, 1978) (Hearing on motion to suppress fruits of search warrant need not be held if, setting aside the portion of the application that is alleged to be perjurious, there is probable cause to justify issuance of the warrant).

CONCLUSION

THE PETITION FOR A WRIT OR CERTIORARI SHOULD BE DENIED.

Dated: Riverhead, New York,
October 17, 1978

Respectfully submitted,

PATRICK HENRY
District Attorney of Suffolk County

VINCENT A. MALITO
Chief, Appeals Bureau
FREDERICK EISENBUD
Assistant District Attorney
Of Counsel

APPENDIX

The Opinion of the Court

in People v. Watkins can be found at

406 N.Y.S. 2d 343, and has not been filmed.